

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BILLY BRANTLEY, et al.	:	Case No.	C-1-01-378
	:		
Plaintiffs,	:	Judge Susan J. Dlott	
	:		
vs.	:		
	:	DEFENDANT, CINERGY CORP.'S	
CINERGY CORP.	:	<u>MOTION TO COMPEL</u>	
	:	(AFFIDAVIT OF JILL T. O'SHEA	
Defendant.	:	ATTACHED HERETO)	

Comes now Defendant, Cinergy Corp., pursuant to Rule 37 of the Federal Rules of Civil Procedure, and respectfully moves this Court for an Order compelling Plaintiffs, Billy Brantley, Todd Tolbert, Anthony Martin and Rodney V. Jones, to supplement their responses to Defendant, Cinergy Corp.'s, First Set of Interrogatories and Request for Production of Document Propounded to each named Plaintiff. Plaintiffs have failed to supplement their responses despite several requests for supplementation and thus each named Plaintiff's responses are evasive or incomplete and should be treated as a failure to disclose, answer or respond pursuant to Rule 37(a)(3). Defendant further requests that each named Plaintiff be compelled to supplement their medical and employment records and/or produce authorizations directed to their treating physicians and/or employers. Defendant is filing the within Motion to Compel in compliance with the June 2, 2003 Agreed Entry Extending Motion for Summary Judgment Deadline and Briefing Schedule and preserve its right to

pursue this outstanding discovery outside of the discovery cut-off. This Motion is supported by the within memorandum, the affidavit of Jill T. O'Shea, Esq. attached hereto and the Exhibits attached thereto and Federal law. Defendant respectfully requests an oral conference with the court to resolve the within dispute in the event that ongoing settlement negotiations fail.

Respectfully submitted,

/s/ Jill T. O'Shea
Jill T. O'Shea (0034692)
Attorney for Defendant,
Cinergy Corp.
139 E. Fourth Street
25 Atrium II
P.O. Box 960
Cincinnati, OH 45201-0960
513-287-2062

/s/ Gregory V. Mersol
Gregory V. Mersol (0030838)
John B. Lewis (0013156)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth St.
Cleveland, OH 44114-3485
Telephone: (216) 621-0200
Facsimile: (216) 696-0740

*Attorneys for Defendant
Cinergy Corp.*

MEMORANDUM

Counsel for Defendant, Cinergy Corp., is familiar with Judge Dlott's court rules related to deciding discovery disputes orally by phone call or conference with the court

without the filing of written motions and that after conferring with Judge Dlott's law clerk on this procedural issue, she is filing within Motion to Compel to preserve Defendant, Cinergy Corp.'s, rights to pursue this discovery outside of the discovery cut-off consistent with the language of the June 2, 2003 Agreed Entry Extending Motion for Summary Judgment Deadline and Briefing Schedule which provides, in pertinent part, as follows:

Plaintiffs further agree that plaintiffs waive any objection to Defendant, Cinergy Corp., filing a Motion to Compel on or before July 1, 2003 and after the expiration of the discovery cut-off of May 30, 2003 as to the defendant's outstanding request for supplementation of plaintiffs' responses to Defendant, Cinergy Corp.'s, First Set of Interrogatories and Request for Production of Documents Propounded to Each Named Plaintiff.

(See §3 of Affidavit of Jill T. O'Shea, Esq.).

Defendant, Cinergy Corp.'s, First Set of Interrogatories and Request for Production of Documents Propounded to each named Plaintiff were originally served on or about October 18, 2001. Responses were received from each named Plaintiff on or about December 30, 2001.

On or about January 31, 2003, correspondence was forwarded via facsimile and ordinary mail to Plaintiffs' Counsel, Paul Tobias, David Sanford and Grant E. Morris, requesting supplementation of Plaintiffs' discovery responses and enclosing Defendant, Cinergy Corp.'s Second Set of Interrogatories and Request for Production of Documents Propounded to named plaintiffs (See §4 of Affidavit of Jill T. O'Shea, Esq. and Exhibit "A").

On or about March 31, 2003, defendant received Plaintiffs' Responses to Defendant's Second Set of Interrogatories and Request for Production of Documents without receipt of the supplementation of the Plaintiffs' Responses to Defendant's First Set of Interrogatories and Request for Production of Documents. (See §5 of Affidavit of Jill T. O'Shea, Esq.).

On or about March 31, 2003, correspondence was forwarded via facsimile and ordinary mail to Plaintiffs' Counsel requesting supplementation of Defendant's First Set of Interrogatories and Request for Production of Documents Propounded to each named plaintiff on or before April 14, 2003 (See §6 of Affidavit of Jill T. O'Shea, Esq. and Exhibit "B").

On or about April 28, 2003, correspondence was forwarded via facsimile and ordinary mail to Plaintiffs' Counsel again requesting supplementation of Defendant, Cinergy Corp.'s First Set of Interrogatories and Request for Production of Documents Propounded to each named plaintiff on or before the mediation scheduled on May 19-20, 2003. (See §7 of Affidavit of Jill T. O'Shea, Esq. and Exhibit "C").

On or about April 29, 2003, defendant received supplementation of Plaintiffs' Responses to Defendant, Cinergy Corp.'s First Set of Interrogatories and Request for Production of Documents (See §8 of Affidavit of Jill T. O'Shea, Esq. and Exhibit "D").

On or about April 30, 2003, correspondence was forwarded via facsimile and ordinary mail to Plaintiffs' Counsel requesting supplementation of discovery on the grounds that the responses were incomplete or evasive in violation of Rule 26(a) of the Federal Rules of Civil Procedure (See §9 of Affidavit of Jill T. O'Shea, Esq. and Exhibit "E").

On or about May 27, 2003, correspondence was forwarded via facsimile and ordinary mail to Plaintiffs' Counsel requesting supplementation of Plaintiffs' Responses to Defendant, Cinergy Corp.'s First Set of Interrogatories and Request for Production of Documents to each named plaintiff by the continuation of the mediation which was to held on June 19, 2003 (See §10 of Affidavit of Jill T. O'Shea, Esq. and Exhibit "F").

To date, each named Plaintiff has not supplemented his responses to Defendant, Cinergy Corp.'s, First Set of Interrogatories and Request for Production of Documents to Each Named Plaintiff, nor produced executed medical authorizations or authorizations to inspect personnel files. (See §11 of Affidavit of Jill T. O'Shea, Esq.).

Defense counsel has attempted to exhaust extra-judicial remedies (See §12 of Affidavit of Jill T. O'Shea, Esq.).

Accordingly, Defendant, Cinergy Corp., respectfully requests that this Court grant Defendant, Cinergy Corp.'s, Motion to Compel in accordance with Rule 37 of the Federal Rules of Civil Procedure and order that each named Plaintiff be required to supplement his discovery responses. Defense counsel will request a phone conference with the court on this discovery dispute in the event that ongoing settlement discussions fail. (See § 13 of Affidavit of Jill T. O'Shea, Esq.).

Respectfully submitted,

/s/ Jill T. O'Shea

Jill T. O'Shea (0034692)
Attorney for Defendant,
Cinergy Corp.
139 E. Fourth Street
25 Atrium II
P.O. Box 960
Cincinnati, OH 45201-0960
513-287-2062

/s/ Gregory V. Mersol

Gregory V. Mersol (0030838)
John B. Lewis (0013156)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth St.
Cleveland, OH 44114-3485
Telephone: (216) 621-0200

Facsimile: (216) 696-0740

*Attorneys for Defendant
Cinergy Corp.*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was forwarded via ordinary mail this
28th day of July, 2004 to:

Paul H. Tobias
David D. Kammer
TOBIAS, KRAUS & TORCHIA, LLP
414 Walnut Street
Suite 911
Cincinnati, OH 45202

David W. Sanford, Esq.
Sanford, Wittels & Heisler, LLP
2120 K Street NW
Suite 700
Washington, D.C. 20037

Barry Vaughn Frederick
Herman Nathaniel Johnson, Jr.
Robert L. Wiggins
Ann K. Wiggins
Susan Donahue
Robert F. Childs
Wiggins, Childs, Quinn & Pantazis, P.C.
1400 South Trust Tower
420 North 20th Street
Birmingham, Alabama 35203

Grant E. Morris
Law Offices of Grant E. Morris
7 DuPont Circle, N.W.
Suite 250
Washington, D.C. 20036

/s/ Jill T. O'Shea

Jill T. O'Shea